IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

LOIS KENNEDY, Plaintiff, vs. KELLY ASSISTED LIVING SERVICES, Defendant.	No. C03-0096 **ORDER**

This matter comes before the court pursuant to the defendant's July 19, 2004, motion for summary judgment (docket number 9). The parties have consented to the exercise of jurisdiction by a United States Magistrate Judge. For the reasons set forth below, the defendant's motion is granted.

Statement of Material Facts Taken in a Light Most Favorable to the Plaintiff

Lois Kennedy, a 75-year old woman, brought this employment discrimination action against Kelly Assisted Living Services, an in-home care provider for the elderly, disabled, and those recovering from illness and injury, a corporation with offices in Cedar Rapids, Iowa. The plaintiff claims that the defendant terminated her employment on February 26, 2001 because of her age, in violation of the Age Discrimination in Employment Act (ADEA).[1]

[1] The court notes that in the plaintiff's resistance to the defendant's motion for summary judgment the plaintiff attempts to additionally argue that the defendant engaged in age discrimination by progressively reducing her work hours. This allegation was not presented in the plaintiff's complaint, nor did the plaintiff subsequently request leave of court to amend the complaint to include the same. Accordingly, the court will not address the merits of this allegation.

The plaintiff began employment with Kelly Assisted Living Services on December 15, 1999, as a Certified Nursing Assistant (CNA)/Home Health Assistant. Her job duties included general housework, meal planning, grocery shopping, serving meals, providing companionship to patients, reminding and/or assisting clients with self-administration of medications, reporting changes in a patient's condition or family situation to the branch office, and helping to physically move patients from place to place. In April, 2000, the plaintiff received a satisfactory performance review and a bonus. The plaintiff worked approximately thirty to forty hours per week prior to Dawn Gibson commencing employment with the defendant. After Ms. Gibson began employment as an administrator, the plaintiff's hours were progressively reduced and eventually decreased to approximately nine hours per week. When the plaintiff asked Ms. Gibson for an explanation as to why her work hours were being reduced, Ms. Gibson told her that "they requested younger people--or needed younger people."[2]

On December 1, 2000, the plaintiff left an Alzheimer's patient unattended while under her care and the patient fell and hit her head. The plaintiff was not disciplined for the incident. On December 30, 2000, the plaintiff grabbed an Alzheimer's patient under her care and sat the patient down on the floor after the patient began to "move backwards"

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[2] The court finds that by "they," the plaintiff is referring to the defendant's clients. This finding is based on the context of the word "they" within the plaintiff's deposition testimony, which in relevant part reads as follows:

> Q: And what makes you think that [Ms. Gibson] thought that you were too old to work? A: Well, because there were several different times that she told me they needed younger girls, the clients I was seeing, and one statement the nurse made . . . A: That's when she told me they requested younger people--or needed younger people.

(emphasis added).

from her walker.[3] The plaintiff failed to report the incident and explained that she did not notify the office about it because the incident occurred during the holidays and the office was closed. The plaintiff discussed the incident with Nursing Supervisor Patti Pavic on January 2, 2001. Ms. Pavic told the plaintiff that the particular Alzheimer's patient needed more skilled care than the plaintiff could provide. Ms. Pavic told the plaintiff, "[y]ou want to remember, Lois, you're not as young as you used to be!"

During an employee in-service meeting concerning dress code on February 15, 2001, the plaintiff inquired of Ms. Gibson as to why her work hours had been reduced. Ms. Pavic, the in-service meeting facilitator, told the plaintiff that the meeting "was not the time or the place to discuss things like this."[4] The plaintiff then made a remark concerning Ms. Gibson's name. After the in-service meeting, the plaintiff spoke with Ms. Pavic about her reduced work hours. According to the plaintiff's statement in her Equal Employment Opportunity Commission (EEOC) complaint, Ms. Pavic told the plaintiff at some point that Service Coordinator Gwen Kirkwood was responsible for the scheduling of the plaintiff's hours. According to the plaintiff's deposition testimony, at some point the plaintiff spoke with a Kelly Services District Manager, Mary Beth, who indicated to the plaintiff that the scheduling was "[Ms. Gibson's] doing, [Ms. Gibson] was new in the job, and to wait it out and see [w]hat happens."

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[3] The court here notes that despite the plaintiff's characterization of the December 30, 2000 incident as that of a "prevented" fall, the defendant's log book indicates that a friend of the Alzheimer's client contacted the defendant and complained that the client had actually fallen on December 30, 2000 while in the care of the plaintiff.

[4] The court notes that although the plaintiff states in her deposition testimony that it was Ms. Gibson who was the meeting facilitator and who told the plaintiff that the in-service meeting was an inappropriate forum to discuss her scheduling concerns, such a statement contradicts the defendant's log books, as cited in the plaintiff's response to the defendant's statement of facts, which indicate that it was Ms. Pavic who was the in-service meeting facilitator and the person who spoke with the plaintiff about the appropriateness of discussing her scheduling concerns.

The plaintiff was called into the office on February 26, 2001, to see Gwen Kirkwood. The plaintiff recited the details of this meeting wherein her employment was terminated as follows: "Since I was pestering her for hours, the district manager said it was time we parted company."[5] Also according to the plaintiff's EEOC complaint, the plaintiff then asked Ms. Kirkwood "if she was firing [the plaintiff], and [Ms. Kirkwood] said 'yes.'" The Corrective Action Form documenting the plaintiff's discharge indicated that she was discharged due to insubordination and confidentiality. After the plaintiff's employment was terminated, the defendant offered additional reasons for its decision, including her abusive language, patient complaints, and inappropriate behavior. Plaintiff's former clients were placed with younger employees.

The plaintiff filed a complaint with the Cedar Rapids Civil Rights Commission (CRC) on May 29, 2001, alleging age discrimination and retaliation. On August 7, 2003, the plaintiff filed this discrimination claim against the defendant.

Summary Judgment: The Standard

A motion for summary judgment may be granted only if, after examining all of the evidence in the light most favorable to the nonmoving party, the court finds that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. Kegel v. Runnels, 793 F.2d 924, 926 (8th Cir. 1986). Once the movant has properly supported its motion, the nonmovant "may not rest upon the mere allegations or denials of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "To preclude the entry of summary judgment, the nonmovant must show that, on an element essential to [its] case and on

[5] The court notes that in her deposition testimony, the plaintiff states that it was Ms. Gibson who held the February 26, 2001 meeting with her and terminated her employment. However, that testimony contradicts both the plaintiff's prior statement in her EEOC complaint as well as the February 26, 2001 entry in the defendant's log book, which indicate that it was Ms. Kirkwood who held the February 26, 2001 meeting with the plaintiff and terminated her employment.

which it will bear the burden of proof at trial, there are genuine issues of material fact." Noll v. Petrovsky, 828 F.2d 461, 462 (8th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986)). Although "direct proof is not required to create a jury question, . . . to avoid summary judgment, 'the facts and circumstances relied upon must attain the dignity of substantial evidence and must not be such as merely to create a suspicion.'" Metge v. Baehler, 762 F.2d 621, 625 (8th Cir. 1985) (quoting Impro Prod., Inc. v. Herrick, 715 F.2d 1267, 1272 (8th Cir. 1983)).

The nonmoving party is entitled to all reasonable inferences that can be drawn from the evidence without resort to speculation. Sprenger v. Fed. Home Loan Bank of Des Moines, 253 F.3d 1106, 1110 (8th Cir. 2001). The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. Id. Although it has been stated that summary judgment should seldom be granted in employment discrimination cases, summary judgment is proper when a plaintiff fails to establish a factual dispute on an essential element of her case. Helfter v. UPS, Inc., 115 F.3d 613, 615-16 (8th Cir. 1997). The standard for the plaintiff to survive summary judgment requires only that the plaintiff adduce enough admissible evidence to raise genuine doubt as to the legitimacy of the defendant's motive, even if that evidence did not directly contradict or disprove defendant's articulated reasons for its actions. O'Bryan v. KTIV Television, 64 F.3d 1188, 1192 (8th Cir. 1995). To avoid summary judgment, the plaintiff's evidence must show that the stated reasons were not the real reasons for the plaintiff's discharge and that sex or other prohibited discrimination was the real reason for the plaintiff's discharge. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153 (2000) (quoting the district court's jury instructions).

Conclusions of Law

Age Discrimination

In order to move forward with her claim of age discrimination based on her termination, the plaintiff first must establish a prima facie case under Title VII. See McDonnell Douglas v. Green, 411 U.S. 792 (1973). To prove a prima facie case of age discrimination, the plaintiff must demonstrate that (1) at the time she was fired she was a member of the class protected by the ADEA ("individuals who are at least 40 years of age,"; (2) she was otherwise qualified for the position of CNA/Home Health Aid; (3) she was discharged by the defendant; and (4) the defendant subsequently filled the plaintiff's position with persons outside of the relevant protected class. See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142 (citing 29 U.S.C. § 631(a)). When a plaintiff alleges disparate treatment, such as the plaintiff in the instant matter, "liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." Reeves, supra, at 141 (citing Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)). "That is, the plaintiff's age must have 'actually played a role in the employer's decisionmaking process and had a determinative influence on the outcome.'" Id. (citing Hazen Paper Co., supra, at 610)).

Under McDonnell Douglas, if the plaintiff produces sufficient evidence from which a reasonable trier of fact could find elements of her prima facie case, the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for its decision to terminate the plaintiff's employment. McDonnell Douglas, supra, at 802-03. "This burden is one of production, not persuasion; it can involve no credibility assessment." Reeves, supra, at 142 (citing St. Mary's Honor Center v. Hicks, 509 U.S. 502, 510 (1993)). The defendant thus may satisfy its burden by offering admissible evidence sufficient for a trier of fact to conclude that the plaintiff's employment was terminated because of poor work performance and an inappropriate outburst. Id. If the defendant meets its burden, the plaintiff must then produce sufficient evidence from which

a reasonable trier of fact could find the defendant's explanation to be pretext, and that the real reason for terminating the plaintiff was intentional age discrimination. See McDonnell Douglas, supra, at 804. "If the plaintiff cannot show that the reason was pretext, the defendants are entitled to summary judgment." Horton v. Rockwell International Corporation, 93 F. Supp.2d 1048, 1052 (N.D. Iowa 2000) (citing Thomas v. St. Lukes Health Systems, Inc., 869 F. Supp. 1413 (N.D. Iowa 1994)). "Although intermediate evidentiary burdens shift back and forth under the McDonnell Douglas framework, 'the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" Reeves, supra, at 143 (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

The plaintiff was 72 years old when the defendant terminated her employment and accordingly, she is a member of the class of persons protected from discrimination under the ADEA. The parties stipulate that the plaintiff was discharged by the defendant. The defendant argues, however, that the plaintiff was not otherwise qualified because she did not satisfactorily perform her work as a CNA. In support of its contention that the plaintiff was not otherwise qualified to perform her work as a CNA, the defendant cites numerous complaints received concerning the plaintiff's work performance including, (1) in November, 2000, a patient's son requested that the plaintiff not return due to a personality conflict; (2) also in November, 2000, a co-worker reported on two occasions that the plaintiff had treated her rudely; (3) in December, 2000, one patient fell and another had to be prevented from falling while under the care of the plaintiff, and the plaintiff failed to immediately report the second incident; and (4) in January, 2001, the defendant received the following complaints concerning the plaintiff:

> (1) a patient's friend told the defendant that if they ever sent the plaintiff to care for the patient again, the friend would find an alternative care service for the patient; (2) a patient's son requested that the plaintiff not return as the patient was uneasy about the plaintiff's ability to care for her; (3) a patient's wife informed the defendant that she was not confident in the

> plaintiff's ability to move the patient around as necessary and the defendant responded by assuring the wife that they would meet the patient's needs with other caregivers; and (4) a patient stated that the plaintiff was not to return to her service because she had to "redo almost everything" that the plaintiff had done.

In addition to these complaints, the defendant points to the plaintiff's inappropriate demeanor during the February 15, 2001 in-service meeting as evidence that the plaintiff performed her job poorly and was thus not otherwise qualified.

The plaintiff in turn argues that she was otherwise qualified for the position of CNA. In support of her argument, the plaintiff points out that she received positive comments concerning her care from patients as well as friends and family members of patients, that she received a satisfactory performance review and bonus in April, 2000, and that she never learned of any of the alleged patient complaints nor was she disciplined for the same. Viewing the evidence in a light most favorable to the plaintiff, the court finds that the plaintiff has proffered evidence showing that she was "otherwise qualified" for the position which she held. A genuine issue of material fact here exists because there is a dispute of fact, specifically whether the plaintiff did or did not perform her work as a CNA poorly, the disputed fact is material to the outcome of this case, and the dispute appears to be genuine as a reasonable jury could return a verdict on this issue for either party. See Austin, supra, at 995 (citing Peter v. Wedl, 155 F.3d 992, 996 (8th Cir. 1998)). The court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but to determine whether there are genuine issues for trial. See Bauer v. Metz Baking Company, 59 F. Supp. 2d 896, 908 (N.D. Iowa 1999). The court thus finds that the plaintiff has presented sufficient evidence to raise a genuine issue of material fact as to whether she was otherwise qualified. See Austin v. Minnesota Min. & Mfg. Co., 193 F.3d 992, 995 (8th Cir. 1999). Finally, after the plaintiff was terminated, employees outside of the class of persons protected under the ADEA began working with

the plaintiff's former clients. Accordingly, the court finds that the plaintiff has satisfied her prima facie burden.

The defendant asserts that its decision to terminate the plaintiff was based on the plaintiff's poor work performance and insubordinate conduct. In support of its proffered legitimate nondiscriminatory reason for the termination, the defendant states that it received nine unrelated complaints concerning the plaintiff, many of which are described above, that at least one patient under the plaintiff's care fell as a result of her poor performance and the plaintiff further failed to report the December 30, 2000 incident, and that the plaintiff had an inappropriate "outburst" at the February 15, 2001 in-service meeting. The defendant additionally argues that the plaintiff was hired at age 70, and that it is highly unlikely that the defendant suddenly subsequently developed an aversion to older people. Similarly, the defendant argues that the majority of people employed by the defendant are within the class of persons protected under the ADEA. Additionally, the defendant asserts that the plaintiff admitted within her written statement to the Iowa Workforce that she was terminated for reasons related to her work performance, recording that she was "discharged on 2-26-01 . . . stating residents did not want me back." Finally, the defendant points out that the plaintiff did not herself understand at least one of the age-based comments to be discriminatory, set forth in her deposition testimony as follows:

> Q: When [Ms. Pavic] said 'you aren't as young as you used to be,' was there any other statement that was made to you at that time? A: No. Q: Did you take any meaning from that statement to you that you aren't as young as you used to be? A: No. Q: Okay. Do you give any other meaning to that statement now? A: No.

The plaintiff contends that the defendant's proffered legitimate non-discriminatory reasons for terminating her employment are pretext. In support of her contention, the plaintiff argues that (1) the two age-related comments made to the plaintiff indicate that she was discharged because of her age; (2) the alleged patient complaints cannot serve as a basis for discharge absent any prior discipline of the plaintiff for the same and the alleged

complaints also had no basis in fact; (3) the plaintiff's behavior at the February 15, 2001 in-service meeting did not rise to the level of "insubordination," which was the "apparent" reason given for her discharge; (4) the plaintiff was the oldest employee of the defendant and was replaced by younger workers; and (5) while still employed with the defendant, the plaintiff's work hours were continuously reduced despite "generally good work performance."

The court finds that the plaintiff has failed to produce sufficient evidence from which a reasonable trier of fact could find the defendant's explanation for her termination to be pretext, and that the real reason for its termination of the plaintiff was intentional age discrimination. See McDonnell Douglas, supra, at 804. First, the plaintiff has failed to demonstrate that the two age-related comments made by Ms. Gibson and Ms. Pavic were in any way related to the decision to terminate the plaintiff. The comment by Ms. Pavic to the plaintiff that "[y]ou want to remember, Lois, you're not as young as you used to be," is clearly a statement made by a non-decisionmaker and is therefore not evidence of intentional age discrimination. See Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989). Similarly, Ms. Gibson's comment in response to the plaintiff's inquiry as to why her work hours being reduced, that "[the clients] requested younger people--or needed younger people," clearly falls within the same category of statements made by non-decisionmakers as concerns the decision to terminate the plaintiff's employment. See Price Waterhouse, supra, at 258. Significantly, the plaintiff has not established a connection between Ms. Gibson, Ms. Pavic, or either of their age-related comments and the decision to terminate the plaintiff's employment. Specifically, taking as true the plaintiff's allegation that Ms. Kirkwood told the plaintiff that she was being terminated for "pestering her" about work hours, such a statement, without more, does not establish a connection between the age-related comments by Ms. Pavic or Ms. Gibson and the decision to terminate the plaintiff's employment. Accordingly, the court finds that the plaintiff has not

demonstrated that either age-related comment was in any way related to the defendant's decision to terminate her employment.

The remainder of the plaintiff's evidence in support of her argument that the defendant's legitimate non-discriminatory reason is pretext is likewise not sufficient evidence from which a reasonable trier of fact could find the defendant's explanation to be pretext, and that the real reason for its termination of the plaintiff's employment was intentional age discrimination. See Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989). The plaintiff's argument that her behavior at the February 15, 2001 in-service meeting did not rise to the level of "insubordination" does not demonstrate that the defendant's stated legitimate non-discriminatory reasons are pretext. The defendant has consistently asserted that the plaintiff's employment was not terminated solely for her inappropriate behavior at the in-service meeting, but rather that her employment was terminated due to her poor work performance, client complaints, and her inappropriate behavior at the in-service meeting.

The plaintiff's argument that the alleged patient complaints cannot serve as a basis for discharging her absent any prior discipline of the plaintiff for the same is likewise insufficient to demonstrate pretext. The plaintiff has not alleged nor produced any evidence to indicate that the defendant had a disciplinary policy which it applied in a discriminatory fashion. Rather, the plaintiff has simply alleged that she was not made aware of any client complaints and that she should have been. The plaintiff's argument that the allegations of client complaints had "no basis in fact" is in contradiction with the record before the court. The defendant's log books clearly indicate that it received numerous reports of complaints about the plaintiff, whether or not those complaints were ever communicated to the plaintiff herself.[6]

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[6] The plaintiff has not alleged nor pointed to any evidence which might indicate that the defendant's log books were in any way doctored or falsified, and they are therefore (continued…)

The plaintiff's argument that pretext is demonstrated by the fact that she was the oldest employee of the defendant's and the defendant subsequently replaced her with younger workers must fail. Nelson v. J.C. Penney Co., Inc., 75 F.3d 343, 346 (8th Cir. 1996) (Finding that the fact that the plaintiff's replacement is significantly younger is consistent with age discrimination but of insufficient probative value to persuade a reasonable jury that the plaintiff was discriminated against). Finally, the plaintiff's argument that pretext is shown because her work hours were reduced despite "generally good performance" fails to demonstrate pretext. As previously discussed, the plaintiff has not established a sufficient connection between the reduction in her work hours by Ms. Gibson and the decision by the defendant through the district manager and Ms. Kirkwood to terminate her employment. Accordingly, because the plaintiff has failed to "show that the defendant's legitimate non-discriminatory reason was pretext, the defendant is entitled to summary judgment." Horton v. Rockwell International Corporation, 93 F. Supp.2d 1048, 1052 (N.D. Iowa 2000) (citing Thomas v. St. Lukes Health Systems, Inc., 869 F. Supp. 1413 (N.D. Iowa 1994)).

Upon the foregoing,

IT IS ORDERED

Defendant's motion for summary judgment is granted. This matter is dismissed. The Clerk of Court shall enter judgment for the defendant.

September 30, 2004.

JOHN A. JARVEY
Magistrate Judge
UNITED STATES DISTRICT COURT

[6](…continued)
considered to be relevant evidence going to the issues presented to the court.